No. 75-1020

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAULA DALLAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the district court's jury instruction on entrapment was incorrect.

After a jury trial in the United States Court for the Eastern District of New York, petitioner was convicted of distribution and conspiracy to distribute quantities of cocaine, and co-defendant Carlos Fayad was convicted of possession and conspiracy to distribute quantities of cocaine, in violation of 21 U.S.C. 841(a)(1) and 846 and 18 U.S.C. 2.[1] Petitioner was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), for treatment and supervision until discharged. The court of appeals affirmed without opinion (Pet. App. A).

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[1]A third co-defendant, Robert O'Brien, pleaded guilty at the commencement of trial to one count of distribution of cocaine, and the charges on three remaining counts were dismissed as to him.

The government's evidence at trial showed that on March 7, 1975, an informant introduced undercover agent Alfred Cavuto of the Drug Enforcement Administration to petitioner, who immediately offered to sell Cavuto three-quarters of an ounce of cocaine for $900 and discussed the possibility of future drug sales. Petitioner then drove Cavuto to a meeting place where she introduced him to Robert O'Brien, who had the cocaine, and the sale was effected (Tr. 128-132, 276, 815-816, 869-873). On April 30, 1975, petitioner again drove Cavuto to a meeting with O'Brien, at which Cavuto purchased an ounce of cocaine for $1,300, $100 of which O'Brien gave petitioner for her role as middleman (Tr. 199-205, 454-455, 468, 862, 906-909).

On May 21, 1975, Cavuto arrested O'Brien after O'Brien had attempted to sell him eight ounces of cocaine. O'Brien then led Cavuto to his supplier, co-defendant Fayad, who was in O'Brien's apartment awaiting his share of the proceeds from the anticipated sale (Tr. 239-242, 248, 461-463, 643-644).

Petitioner's defense at trial was entrapment, and in support thereof she testified that the informant and Cavuto had repeatedly implored her to obtain cocaine for Cavuto, and that, despite her efforts to avoid them, she eventually agreed to their requests (Tr. 801-833, 913-925).

The district court's entrapment charge repeated virtually word-for-word the instruction requested by petitioner (compare Tr. 1103-1104 with page 59a of petitioner's appendix in the court of appeals and then included these two additional paragraphs (Tr. 1104-1105):

> The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction? On this issue the defendant has the burden of proof. She does not have to prove it beyond a reasonable doubt but she must prove it by a preponderance of the evidence. That is, she must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.
>
> The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt.

Petitioner claims that this instruction deprived her of a fair trial by incorrectly charging the jury as to the government's burden of proof.

1. We note at the outset that petitioner was not entitled to any entrapment instruction. She testified that she had been buying and using drugs for approximately two months prior to the government informant's initial approach to her (Tr. 886, 898); that she had been purchasing drugs from another individual who was supplied the drugs by O'Brien (Tr. 854); that she had arranged for yet another individual to purchase drugs directly from O'Brien (Tr. 848-849); that when Agent Cavuto first came to her apartment for the purpose of being introduced to and purchasing drugs from O'Brien she told him not to worry because she had acted as intermediary for previous drugs sales with O'Brien and no problems had arisen (Tr. 871); that on that first

meeting with Cavuto she had offered to sell him a certain kind of marijuana cigarette (Tr. 871) and had shown him some golden colored marijuana in a plastic bag (Tr. 873); that she had told Cavuto that O'Brien would pay her for her part in the illegal transaction (Tr. 876-877); and that on another occasion she asked Cavuto whether he wished to purchase a quantity of methamphetamine (Tr. 885). Petitioner never once testified that before being approached by the informant she was a stranger to the drug trade or that she had resisted his requests because she was not a drug dealer. Rather, her own testimony established conclusively that she was an experienced and willing participant in various illegal drug transactions, for which she was paid a share of the proceeds. In sum, there was no evidence whatever from which the jury could have determined that petitioner had been "otherwise innocent" (*Sorrells* v. *United States*, 287 U.S. 435, 448) before the government informant first asked her whether she could arrange for a purchase of cocaine by the government agent; and when, as here, there is uncontroverted evidence of a defendant's propensity to commit a crime, the issue of entrapment need not be submitted to the jury (whether or not the government induced the crime). *United States* v. *Miley*, 513 F.2d 1191, 1202 (C.A. 2); *United States* v. *Riley*, 363 F.2d 955, 959 (C.A. 2).

2. In any event, the windfall entrapment instruction petitioner received did not deprive her of a fair trial. It is true, as petitioner points out (Pet. 5-6), that the preferred practice in the Second Circuit is to avoid a bifurcated instruction in favor of one charging the jury, once "some evidence of government initiation of the illegal conduct" has been found, to focus on the single question whether the government has proved predisposition beyond a reasonable doubt. *United States* v. *Braver*, 450 F.2d 799, 805 (C.A. 2), certiorari denied, 405 U.S. 1064. In this case, however, the giving of the disfavored form of the entrapment instruction could not conceivably have prejudiced petitioner. The rationale behind the dissatisfaction with the bifurcated charge is that it may confuse the jury and lead them to place too great a burden on the defendant of showing the initial inducement that is the threshold issue in entrapment cases. See *Notaro* v. *United States*, 363 F.2d 169, 175-176 (C.A. 9); *Kadis* v. *United States*, 373 F.2d 370, 373 (C.A. 1); *United States* v. *Watson*, 489 F.2d 504 (C.A. 3). But here is was undisputed that, by the pre-arranged introduction of petitioner to Agent Cavuto, the government initiated the particular transactions that occasioned this prosecution, and thus it cannot reasonably be supposed that the jury rejected petitioner's defense on the basis of the first half of the bifurcated instruction—*i.e.*, that petitioner had failed to show governmental initiation—rather than upon the second—*i.e.*, petitioner's predisposition.

Thus, even though in some cases the giving of the bifurcated entrapment instruction has been held to be reversible error (*e.g.*, *United States* v. *Watson, supra*), in this case the instruction amounted to harmless error at most. Petitioner points to no conflict among the circuits over the issue whether the "unitary" charge is to be preferred to the bifurcated, and indeed cites no decision holding that the latter instruction may not be harmless error in an appropriate case (the facts in *Watson, supra*, were markedly different from those here). Thus, the petition presents no issue of continuing importance worthy of review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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